

Thirupathy a/l Muniandy v Bintumathy a/p Ramakrishnan

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HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS

NO BA-24F-417-11 OF 2018

HAYATUL AKMAL J

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20 AUGUST 2019

Family Law — Children — Custody — Parties entered into consent order on custody of children — Plaintiff applied for variation of consent order — Whether plaintiff husband can vary and/or review terms in consent order — Whether plaintiff husband should be given custody of children — Law Reform (Marriage and Divorce) Act 1976 ss 88(2), 88(3), 92 & 93 — Rules of Court 2012 O 42 r 3 & O 57 r 2

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Briefly, the plaintiff husband ('the PH') and the defendant wife ('the DW') were married on 9 December 2010 and were blessed with two children born on 23 November 2012 (now 7+ years old) and on 30 March 2014 (now 5+ years old) ('the said children'). On 4 May 2017, PH filed this originating summons claiming for guardianship, custody, care and control of the children of the marriage or in the alternative he be given access to the said children. This OS was objected to by DW. After a period of exchanging affidavits, parties agreed to enter consent order on 7 January 2018 before the learned Family Court judge in Alor Setar, Kedah. After almost a year and after filing notice of transfer to Family Court in Shah Alam, PH filed in this application (encl 26) under O 42 r 13 of the ROC 2012, seeking to vary and/or reviewed the terms in the said consent order by seeking the custody, care and control of the said children and claiming for maintenance of the said children from DW and other prayers which appeared to be a reversal of the terms of the said consent order. The PH submitted that there had been a material change in the circumstances based on the factors as stated in his affidavits in support and submission.

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Held, dismissing the application with costs of RM2,000:

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- (1) It is trite that consent order must rarely be disturbed unless there are exceptional circumstances that warrants the intervention of the court and the burden is on the applicant to prove on balance of probabilities that the need to vary legally existed. PH's present application based on the alleged ground of material change in circumstances was premised on mostly conjectures with no plausible proof in support. Proof regarding the truthfulness of a claim lies with the one who makes the claim, if this burden is not met, then the claim is unfounded and its opponents need not argue further in order to dismiss it. As the facts of the case had disclosed the consent order was recorded on 7 January 2018 and by

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- A consent of the parties herein in the presence of their respective legal counsels, it was mutually agreed that custody care and control of the said children were given to DW and access were given to PH every weekends from Saturday 9am until Sunday, 2pm commencing from 13 January 2018, one week during long school holidays, on the said children's birthday and Deepavali on alternate years, daily telephone call for 30 minutes and a place to pick up and drop off, of the said children at the entrance of police station SS17 (see paras 13–14).
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- C (2) The PH in the present case has failed to discharge the burden place upon him and what he had presented and adduced did not constitute material change in circumstances to warrant a variation of the said consent order. It was the court's considered view that the arguments of PH as reflected in para [7] of the judgment was a fallacious effort to seek a variation of the said consent order. The link in events did not necessarily imply connection or the expected outcome from such events (see paras 15–16).
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- E (3) As for PH's application for custody of the child on the ground that he had time to take care of the said children, the paramount consideration for determining custody under ss 88(2) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') shall be the welfare of the child even though the court shall have regard to the wishes of the parents of the child, and the wishes of the child where he or she was of an age to express an independent opinion. The said children were currently seven years old and five, there was a rebuttable presumption under s 88(3) of the Act that enhanced the natural law that the custody of any child below the age of seven years shall be given to the mother. No materials of evidential value had been presented by PH to rebut this statutory presumption or to justify why changes in custody in the present case was required. There was a long line of authorities that held that the mother should be entitled to custody of a child during what was called the period of nurture, until the child attained seven years (see paras 17–18).
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- G (4) The court found no material of significance presented by PH to support the alleged detriment impacted on the welfare and the interests of the said children by continuing to stay with DW. Allegations by PH of DW's unsuitability remained merely that, bare allegations with no probative materials and/or basis to anchor it on except conjectures by PH. In the circumstances of the case, on balance of probabilities, the court found that PH had no justifiable basis to attempt to revisit and seek a variation of the said consent order (see paras 22–23).
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[Bahasa Malaysia summary]

Secara ringkasnya, suami plaintif ('SP tersebut') dan isteri defendan ('ID tersebut') telah berkahwin pada 9 Disember 2010 dan dikurniakan dengan dua anak yang dilahirkan pada 23 November 2012 (sekarang 7+ tahun)

dan pada 30 Mac 2014 (sekarang 5+ tahun) ('anak-anak tersebut'). Pada 4 Mei 2017, SP memfailkan saman pemula untuk penjagaan, jagaan, kebajikan dan kawalan anak-anak hasil perkahwinan atau secara alternatif beliau diberikan akses kepada anak-anak tersebut. Saman pemula ini dibantah oleh ID. Selepas tempoh penukaran affidavit-afidavit, pihak-pihak bersetuju untuk memasuki perintah persetujuan bersama pada 7 Januari 2018 sebelum hakim Mahkamah Keluarga yang bijaksana di Alor Setar, Kedah. Selepas lebih kurang setahun dan selepas pemfailan notis penukaran ke Mahkamah Keluarga di Shah Alam, SP memfailkan permohonan ini (lampiran 26) di bawah A 42 k 13 Kaedah-Kaedah Mahkamah 2012, meminta untuk perbezaan dan/atau semakan semula terma-terma perintah persetujuan bersama tersebut dengan meminta penjagaan, kebajikan dan kawalan anak-anak tersebut daripada ID dan permintaan-permintaan lain yang menjadi lawan kepada terma-terma perintah persetujuan bersama. SP menghujahkan bahawa terdapat perubahan material di dalam keadaan berdasarkan faktor-faktor yang dinyatakan di dalam affidavit-afidavit sokongan dan hujahan.

Diputuskan, menolak permohonan tersebut dengan kos sebanyak RM2,000:

- (1) Ia adalah lapuk bahawa perintah perjanjian persetujuan mestilah jarang-jarang sekali diganggu melainkan terdapat keadaan-keadaan yang terkecuali yang membenarkan campur tangan mahkamah dan beban adalah pada pemohon untuk membuktikan atas imbalan kebarangkalian bahawa keperluan untuk perbezaan wujud secara undang-undang. Permohonan SP ini adalah berdasarkan asas perubahan material yang dikatakan di dalam keadaan adalah kebanyakannya ramalan-ramalan tanpa bukti yang nyata untuk menyokongnya. Bukti berkenaan dengan kebenaran tuntutan bergantung dengan yang membuat tuntutan, jika beban ini tidak dipenuhi, maka tuntutan ini adalah tidak berasas dan pihak-pihak lawan tidak perlu berbalah dengan lebih lanjut untuk menolaknya. Memandangkan fakta-fakta kes telah mendedahkan bahawa perintah perjanjian persetujuan telah direkodkan pada 7 Januari 2018 dan dengan kebenaran pihak-pihak di dalam kehadiran pegawai undang-undang masing-masing, ia adalah sama-sama dipersetujui bahawa penjagaan, kebajikan dan kawalan anak-anak tersebut diberikan kepada ID dan akses diberikan kepada SP setiap hari minggu daripada Sabtu 9 pagi sehingga Ahad, 2 petang bermula daripada 13 Januari 2018, satu minggu semasa cuti sekolah panjang, pada hari ulang tahun kehadiran anak-anak tersebut dan Deepavali pada tahun giliran, panggilan telefon harian selama 30 minit dan tempat untuk ambil dan tinggalkan anak-anak tersebut di pintu masuk stesen polis SS17 (lihat perenggan 13–14).
- (2) SP di dalam kes ini telah gagal melepaskan beban yang terletak di atasnya dan apa yang telah dibentangkan dan ditambah tidak menjadi perubahan material pada keadaan-keadaan untuk membenarkan perbezaan perintah

- A persetujuan bersama tersebut. Ia adalah pandangan mahkamah yang telah dipertimbangkan bahawa perbalahan-perbalahan SP seperti mana yang terdapat di perenggan [7] penghakiman adalah usaha malang untuk meminta perbezaan perintah perjanjian bersama tersebut. Pautan itu di dalam kejadian-kejadian tidak semestinya menjadi sambungan atau hasil jangkaan daripada kejadian-kejadian tersebut (lihat perenggan 15–16).
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- (3) Berkenaan dengan permohonan SP untuk penjagaan anak atas asas bahawa beliau mempunyai masa untuk menjaga anak-anak tersebut, pertimbangan penting untuk memutuskan penjagaan di bawah s 88(2) Undang-Undang Perbaharuan (Perkahwinan dan Perceraian) Akta 1976 ('Akta tersebut') akan menjadi kebajikan anak walaupun mahkamah mengambil kira kemahuan-kemahuan ibu-bapa anak, dan kemahuan-kemahuan anak di mana yang lelaki atau perempuan cukup umur untuk menyuarakan pendapat tersendiri. Anak-anak tersebut sekarang berumur tujuh tahun dan lima, terdapat andaian yang boleh disangkal di bawah s 88(3) Akta tersebut yang meningkatkan undang-undang semula jadi bahawa penjagaan mana-mana anak di bawah umur tujuh tahun patut diberikan kepada ibu. Tiada keterangan yang material telah dibentangkan oleh SP untuk menyangkal andaian statutori ini atau untuk memberikan penjelasan mengapa perubahan-perubahan di dalam penjagaan di dalam kes ini diperlukan. Terdapat otoriti-otoriti yang panjang yang memutuskan bahawa ibu sepatutnya layak kepada jagaan anak di dalam tempoh yang dipanggil tempoh memupuk, sehingga anak berumur tujuh tahun (lihat perenggan 17–18).
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- (4) Mahkamah mendapati tiada material yang penting yang dibentangkan oleh SP untuk menyokong kesusahan impak yang dikatakan di atas kebajikan dan minat anak-anak tersebut dengan terus tinggal bersama ID. Dakwaan-dakwaan bahawa SP mengenai ketidakupayaan ID kekal sebagai hanya, dakwaan semata-mata tanpa material yang probative dan/atau asas untuk memegang ramalan-ramalan SP. Dalam keadaan ini, atas dasar imbalan kebarangkalian, mahkamah mendapati bahawa SP tidak mempunyai asas yang boleh diterangkan untuk cuba melewati semua dan meminta perbezaan perintah persetujuan bersama tersebut (lihat perenggan 22–23).]

Notes

- I For cases on custody, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3902–3962.

Cases referred to

Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457; [1995] 4 CLJ 127, CA (refd)

- Chew Hon Keong v Betterproducts Industries Sdn Bhd & Ors* [2013] 7 MLJ 196, HC (refd) **A**
- Edgar v Edgar* [1980] 3 All ER 887, CA (refd)
- Hau Choong Meng v Heng Seet Fun* [2019] 7 MLJ 694, HC (refd)
- Lau Hui Sing v Wong Chuo Yong (F)* [2008] 5 MLJ 846, HC (refd) **B**
- Lee Cheong Fah v Soo Man Yoke* [1996] 2 MLJ 627, HC (refd)
- Loh Kon Fah v Lee Moy Lan* [1976] 2 MLJ 199, FC (refd)
- Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189; [1981] CLJ 174, FC (refd)
- Melissa Marie Albert v Malcolm Fernandez and another appeal* [2019] 2 MLJ 290; [2018] 1 LNS 1963; [2019] 1 AMR 229, CA (refd) **C**
- Ng Say Chuan (H) v Lim Szu Ling (W) and another application* [2010] 4 MLJ 796; [2010] 10 CLJ 31; [2010] AMEJ 0225, HC (refd)
- Sivajothi a/p K Suppiah v Kunathasan a/l Chelliah* [2000] 6 MLJ 48; [2000] 3 CLJ 175, HC (refd) **D**
- Soon Lee Huat Palm Oil Mill Sdn Bhd v Stable-Win Sdn Bhd* [2013] MLJU 257, CA (refd)
- Subramaniam a/l P Govindasamy v Susila a/p S Sankaran* [2017] MLJU 975, CA (refd)
- Vadivellu a/l Kalimuthu v Rajes a/p Subramaniam* [2015] 9 MLJ 149, HC (refd) **E**
- Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585; [2016] 3 CLJ 505, FC (refd)
- W v H* [1987] 2 MLJ 235 (refd)
- YCC @ JCC v LSY* [2006] 7 MLJ 137; [2007] 7 CLJ 207, HC (refd) **F**
- Yeap Chee Fun; Ex P Pernas Trading Sdn Bhd, Re* [2000] 5 MLJ 510; [2000] AMEJ 0246; ; [2000] 5 CLJ 280, HC (refd)
- Yeoh Ken Lee, Kelvin v Liew Chooi Hoong* [2005] 5 CLJ 408, HC (refd)
- Legislation referred to**
- Law Reform (Marriage and Divorce) Act 1976 ss 88(2), (3), 92, 93, 96, 97 **G**
- Rules of Court 2012 O 32 r 13, O 42 r 13, O 57 r 2
- Jasbeer Singh (Noor Shakira with him) (Jasbeer Nur & Lee) for the plaintiff husband.* **H**
- Binthumathy a/p Ramakrishnan (representing herself) the defendant wife.*

Hayatul Akmal J:

INTRODUCTION **I**

[1] This originating summons ('OS') was originally filed in the Family Court, Alor Setar, Kedah on 4 May 2017 where the plaintiff husband ('PH') claimed for guardianship, custody, care and control of the children of the

A marriage or in the alternative he be given access to the said children. On 7 January 2018, PH and DW then entered into a consent order ((encl 18) — ‘the said consent order’) whereby parties had agreed that custody, care and control of the children of this marriage were given to DW and access was given to PH. PH had also agreed to pay RM400 every month for the maintenance of each child and other payments. This OS was then transferred to the Family Court, Shah Alam via a notice of transfer filed under O 57 r 2 of the Rules of Court 2012 (‘the RC 2012’) dated 26 June 2018 (encl 19).

C [2] On 21 January 2019, PH filed this application (encl 26) under O 42 r 13 of the Rules of Court 2012, seeking to vary and/or review the terms in the said consent order by seeking the custody, care and control of the said children and claiming for maintenance of the said children from DW and other prayers. For ease of reference I shall reproduced (in table form) the claim by PH against DW as follows:

No	Para	The said consent order	Proposed amendment/Variation
i.	Para 2	Defendan diberikan hak jagaan, pemeliharaan dan kawalan ke atas kedua-dua anak;	Plaintif diberikan hak jagaan; pemeliharaan dan kawalan ke atas kedua-dua anak;
ii.	Para 3 (a)	Plaintif dikehendaki membayar peruntukkan kewangan bulanan sebanyak RM400 setiap anak berkuatkuasa daripada 1 Februari 2018 dan dibayar sebelum/pada 7 haribulan pada setiap bulan.	Defendan dikehendaki membayar peruntukkan kewangan bulanan sebanyak RM400 setiap anak berkuatkuasa daripada 1 Februari 2018 dan dibayar sebelum/pada 7 haribulan pada setiap bulan.
iii.	Para 4	Plaintif hendaklah membenarkan defendan menggunakan kad perubatan yang disediakan oleh majikan Plaintif untuk keperluan perubatan anak-anak;	Plaintif dan/atau defendan hendaklah memaklumkan kepada satu sama lain jika anak-anak tidak sihat semasa dibawah penjagaan mereka dan plaintif dan/atau defendan harus diberi akses untuk melawat anak-anak ketika mereka diklinik dan/atau hospital.
iv.	Para 5	Plaintif diberikan akses kepada anak-anak seperti berikut ...	Defendan diberikan akses kepada anak-anak seperti berikut ...

No	Para	The said consent order	Proposed amendment/Variation	A
v.	Para 5(a)	Setiap hujung minggu dari pukul 9 pagi (hari Sabtu) hingga pukul 2 petang (hari Ahad) berkuatkuasa daripada 13 Januari 2018	Setiap hujung minggu dari pukul 9 pagi (hari Sabtu) hingga pukul 7 petang (hari Ahad) berkuatkuasa daripada 13 Januari 2018;	B
vi.	Para 5(b)	Pada cuti sekolah: Empat hari bagi cuti sekolah satu minggu; satu minggu bagi cuti jangka panjang yang lain (dengan akses mingguan yang berterusan selepas itu untuk jangka masa yang selebihnya)	Pada cuti sekolah-semua cuti sekolah akan dikongsi 50% diantara plaintif dan defendan dengan plaintif mengambil anak-anak pada separuh cuti terdahulu dan defendan mengambil anak-anak pada separuh cuti terakhir.	C
vii.	Para 5(c)	Plaintif akan mempunyai akses untuk upacara keluarga yang penting dan pada hari ulang tahun anak-anak dan Deepavali secara bergilir se/ang seli;	Defendan akan mempunyai akses untuk upacara keluarga yang penting dan pada hari ulang tahun anak-anak dan Deepavali secara bergilir selang seli dan pada cuti umum;	D
viii.	Para 5(d)	Plaintif berhak untuk berhubung dengan anak — anak melalui panggilan video/telefon tidak/lebih daripada 30 minit pada pukul 9 malam setiap hari;	Defendan berhak untuk berhubung dengan anak-anak melalui panggilan video/telefon tidak lebih daripada 30 minit pada pukul 9 malam setiap hari;	E
ix.	Para 5(e)	Semua pertukaran anak-anak akan dilakukan di pintu masuk Stesen Polis SS17 pada waktu yang ditetapkan;	Semua pengambilan dan pertukaran anak-anak akan dilakukan secara bersilih ganti. Sekiranya plaintif menghantar ke Stesen Polis SS17, defendan perlu menghantar balik anak-anak ke Balai Polis Batu 9, Cheras pada hari berikutnya dan vice versa.	F
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[3] The relevant cause papers are as follows:

- (a) encl 18: The consent order dated 7 January 2018;
- (b) encl 26: PH's application to amend/varied encl 18, filed on 21 January 2019;

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- A** (c) encl 27: Affidavit in support affirmed by Thirupathy a/l Muniandy on 25 January 2019;
- (d) encl 28: Affidavit in reply affirmed by Bintumathy a/p Ramakrishnan on 14 February 2019;
- B** (e) encl 32: Affidavit in reply affirmed by Thirupathy a/l Muniandy on 11 April 2019;
- (f) encl 33: Affidavit in reply affirmed by Bintumathy a/p Ramakrishnan and filed on 24 April 2019; and
- C** (g) encl 37: Affidavit in reply affirmed by Bintumathy a/p Ramakrishnan on 13 May 2019;

Submissions/reply by PH and DW

- D** [4] In this OS, PH is represented by a senior counsel whereas DW a lay person, had earlier filed a notice (encl 5) notifying that she is acting on her own (*bertindak sendiri*). This application was heard before me on 31 May 2019 and after perusing the cause papers filed, respective written submissions of the parties, I dismissed the said application with an order that cost of RM2,000 to be paid forthwith. Dissatisfied, PH had filed this appeal and my reasons are as follows.
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BRIEF FACTS

- F** [5] Briefly, PH and RW were married on 9 December 2010 and were blessed with two children Sanjhanaa Thirupathy a/p Thirupathy born on 23 November 2012 (now 7+ years old) and Sadhanaa Shri a/p Thirupathy born on 30 March 2014 (now 5+ years old), together they will be referred as 'the said children'. RW alleged she was abused by her husband and had lodged several police reports and obtained two medical reports from the government hospital ((exh BR1) — (encl 6)) and was later granted interim protection order ('IPO'). According to DW, on 13 February 2017, because of some disagreement, they quarrelled, and PH hit her face with a 'hand Moringa' where DW had suffered bruises on the left side of her face. On 15 February 2017 DW together with the said children left the matrimonial home and stayed with her parents.
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- I** [6] On 4 May 2017, PH filed this OS which was objected to by DW. After a period of exchanging affidavits, parties agreed to enter consent order on 7 January 2018 before the learned family court judge in Alor Setar, Kedah. After almost a year and after filling notice of transfer to family court in Shah Alam, PH filed in this application (encl 26) under O 42 r 13 of the Rules of Court 2012, seeking to vary and/or reviewed the terms in the said consent order by seeking the custody, care and control of the said children and claiming

for maintenance of the said children from DW and other prayers which appears to be a reversal of the terms of the said consent where he is now seeking to step into the rights given to DW while DW would assumed his. PH averred that there is now a change in circumstances and argued on the inability of DW to fulfil the need/love/finance and custody and care of the children of the marriage

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SUBMISSIONS BY THE PLAINTIFF HUSBAND

[7] The crux of the grounds given by PH in support of his application are as follows:

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(a) he argued that the said children are not happy living with DW where they allegedly suffer mental trauma and stress;

(b) the said children's' education suffers with her as can be seen in a letter from the Head Mistress of Q-Dees (('exh TM' — (encl 21)). At this stage, it is to be noted that this affidavit was filed earlier to support the OS (encl 1) and I find PH did not file any notice of intention to use the earlier affidavits which is a requirement under O 32 r 13 of the RC 2012. I will elaborate this issue at the later part of this judgment;

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(c) under the existing order, he was given the right of access to visit and/or take the children on the weekend where they will be returned to DW's house every Sunday. He however contended that it is always traumatic and stressful for the said children when it's time to return to DW as they are reluctant to do so;

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(d) he expresses his concern on the safety of the said children where it was seen that the said children were sent home by a person unknown to him who appears to have dermatological disorder which may cause discomfort to the children;

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(e) he contends that the said children may suffer trauma and psychological damage by being forced to be in an unstable environment where their education will also suffers as told by their teachers. He argued that DW had unilaterally registered the said children in school without his knowledge. In this regard he argued that the said children deserve to be given the best education possible;

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(f) he contends that he had been informed by the said children that they had moved to several places and stays with a 'tata' (uncle) unknown to PH which presents uncertainty of security for the said children. The said children are entitled to live in better and safe environment;

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(g) he argued that DW who had resigned from her employment no longer has the financial means to support herself and the said children. She presently does part-time cooking work and supplying to a stall in Puchong; and

- A (h) she had failed to comply with the said consent order when she refused to answer call during the important date, ie birthday and refused to allow PH to be with the children during the religious event and during school holidays.
- B It is based on the foregoing that he argued for the variation of the said consent order for the sake of the said children.
- C [8] PH also referred to O 42 r 13 of the RC 2012 which facilitates the right to apply to vary and/or review the said consent order. I was alluded to a few cases, one of which is the case of *Chew Hon Keong v Betterproducts Industries Sdn Bhd & Ors* [2013] 7 MLJ 196 where it was held that ‘liberty to apply’ is simply a device by which further orders may be made when necessary for the purpose of implementing and giving effect to the principal relief already pronounced.
- D In *Hau Choong Meng v Heng Seet Fun* [2019] 7 MLJ 694, it ruled that the terms in the consent judgment may be amended, varied and/or altered if the court is satisfied that it is reasonable and for the welfare of children of the marriage. I was also referred to s 96 of the LRA, where the court may at any time and from time to time vary, or may rescind, any order for the custody or
- E maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been a material change in the circumstances.

SUBMISSIONS BY THE DEFENDANT WIFE

- F [9] The reasons (briefly) given by DW in objecting to PH’s application are:
- G (a) she had never denied PH access to the said children if it is within reasons. It is safer to limit access to day access only as the said children are daughters of very tender years who may be subject to abuse by PH;
- H (b) in this application, there is a failure on the part of PH to set out to the court how he proposes to mind and maintain the said children which presents a better alternative than the current living arrangement that the said children are now enjoying. He merely zoomed in on financial issues and even this is insignificant in degree. She on the other hand contends that they currently live with her senior uncle, Mr Nandirahian a/l Kannan. They both take very good care of the said children and her uncle provides love, care and emotional support to the two girls. As a grandfather of two young girls, he motivates them daily to be very good students and attain best results that they can;
- I (c) she argued that PH claimed to have his and her mother’s support in taking care of the said children but failed to emphasise that they are of poor health with critical illnesses needing support and care. It is her argument that the custody of the said should remained with her so that

she can do her best to ensure that the welfare of the said children is best taken care of and they are free from the abusive environment they were exposed to at such a young age. I was alluded to the case of *Loh Kon Fah v Lee Moy Lan* [1976] 2 MLJ 199, the Federal Court held as follows:

The learned judge was quite right in taking the view that so long as the marriage subsisted between the parties and there were no obstacles in the way of the appellant visiting his children at any time the mother should have the custody.

- (d) she submitted that PH should be given only visiting access on alternate weekends from now and staying access only after the children are much older. The said children (girls) are currently aged seven and five respectively and they are not comfortable without her for a long time. She also allows PH to call the said children once every day at an agreed time appropriate to both parties; and
- (e) as for the video recording as submitted by PH she argued that was a 'staged scenario' whereby the said children told her that they were forced by PH to do so.

Premised on the foregoing, DW submitted that the application ought to be dismissed with cost.

[10] I was referred to ss 92 and 93 of the LRA which provides the duty to maintain children of the marriage, where except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof. The court may at any time order a man to pay maintenance for the benefit of his child if he has refused or neglected reasonably to provide for the child, if he has deserted his wife and the child is in her charge, during the pendency of any matrimonial proceedings or when making or subsequent to the making of an order placing the child in the custody of any other person. The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.

[11] I was also alluded to the case of *Sivajothi a/p K Suppiah v Kunathasan all Chelliah* [2000] 6 MLJ 48 at p 68; [2000] 3 CLJ 175 at p 197, it was held that the word 'maintenance' is a term of very wide scope, as it is settled law that it is a duty of the father to maintain the standard of living his children had enjoyed in the past, that is during the existence of the marriage, the husband's paramount duty to maintain his children covers a wide scope of benefits and

- A interest and maintenance cannot mean only mere subsistence, namely the food she puts in her mouth but must also means the clothes on her back, the house in which she lives and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind. DW is seeking RM2,000 per child as maintenance every month as she must buy
- B food, milk, kindergarten fees, school bus fees, supplements, multi-vitamin, clothes, activities such as martial arts and religious classes. She prays that PH should also be ordered to pay maintenance of RM4,000 per month for the said children since he has undertaken to be willing to maintain them and educate them.
- C

THE LAW

- D [12] The Law Reform (Marriage and Divorce) Act 1976 (Act 164) ('the Act') provides as follows:

(a) s 83 provides as follows:

- E The court may at any time and from time to time vary, or rescind, any subsisting order for maintenance, whether secured or unsecured, on the application of the person in whose favour or of the person against whom the order was made, or, in respect of secured maintenance, of the legal personal representatives of the latter, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

- F (b) s 96 provides as follows:

- G The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

- (c) s 97 provides as follows:

- H The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.

(d) O 42 r 13 of the Rules of Court 2012 provides as follows:

- I Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

In a nutshell, the legal position above could be surmised in the following.

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Section 83:

- (a) the court may at any time and from time to time vary, or rescind, any subsisting order for maintenance and it is incumbent on the party making the application to satisfy the court as to the material change in the circumstances, to enable the court to exercise its discretion in the applicant's favour;
- (b) as a general rule a consent order cannot be set aside, varied or discharged (see *Vadivellu a/l Kalimuthu v Rajes a/p Subramaniam* [2015] 9 MLJ 149); and
- (c) notwithstanding the statutory exceptions to this general rule in matrimonial matters, the court is under a duty to ensure that the issues are not re-litigated (see *Lau Hui Sing v Wong Chuo Yong (F)* [2008] 5 MLJ 846).

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Section 96:

- (a) the court has the power to vary, rescind orders for maintenance and custody on grounds of misrepresentation, mistake of fact or material changes in circumstances:
 - (i) misrepresentation can either be innocent which entitle to rescission, or fraudulent which allows for repudiation (see *Lee Cheong Fah v Soo Man Yoke* [1996] 2 MLJ 627);
 - (ii) mistake of fact is the unconscious ignorance or forgetfulness as to facts material to the contract or into believing in the existences of a thing material to the contract which do not exist while mistake of law is in coming to an erroneous conclusion as to the effects of the law from a series of known facts (see Court of Appeal's decision in *Soon Lee Huat Palm Oil Mill Sdn Bhd v Stable-Win Sdn Bhd* [2013] MLJU 257); and
 - (iii) material changes as to the circumstances is a situation where the existence of or the occurrences of changes that can be deemed to be legally sufficient to invite the court's discretion to address those changes subject always to the facts and circumstances of each case.

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Section 97:

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- (a) notwithstanding any agreement to the contrary, the court has the power to vary the terms of any agreement relating to custody and maintenance of a child;

- A (b) no interests of a child are to be compromised in any documents drawn up by adults (see *W v H* [1987] 2 MLJ 235);
- (c) in *Edgar v Edgar* [1980] 3 All ER 887, Ormrod LJ said:
- B To decide what weight should be given, in order to reach a just result, to a prior agreement ... regard must be had to the conduct of both parties leading up to the prior agreement, to their subsequent conduct in consequence of it ... formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the
- C terms of the agreement.
- (d) the benefit and welfare of the child will be the paramount consideration.

FINDINGS OF THIS COURT

- D [13] The sections above provide the court with power to vary orders for maintenance and orders for custody or maintenance in the circumstances as stated in those sections and the power is not limited to non-consensual (see *Yeoh Ken Lee, Kelvin v Liew Chooi Hoong* [2005] 5 CLJ 408). In *Subramaniam*
- E *a/l P Govindasamy v Susila a/p S Sankaran* [2017] MLJU 975, the Court of Appeal said:
- [11] On the issue of amending a consent order or terms, the court will not readily entertain the application. However, to say that the court has no powers to amend the consent order or terms on the grounds of solicitor's mistake may not be totally
- F correct. It all depends on the facts and justice of the case.

- An order as such can be varied at any time by the court based on any circumstances as set out in the said section. In the case of *Ng Say Chuan (H) v Lim Szu Ling (W) and another application* [2010] 4 MLJ 796; [2010] 10 CLJ
- G 31; [2010] AMEJ 0225 the court held that:

- [1] A consent order must rarely be disturbed unless there are exceptional circumstances that warrant the intervention of the court. Under s 96 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), the court has the discretionary
- H power to vary the interim order for custody or maintenance of the children if there is any material change in the circumstances.

- It is trite that consent order must rarely be disturbed unless there are exceptional circumstances that warrants the intervention of the court and the
- I burden is on the applicant to prove on balance of probabilities that the need to vary legally existed.

[14] In the present application, PH submitted that there has been a material change in the circumstances based on the factors as stated in his affidavits in

support and submission. It is my considered view that PH's present application based on the alleged ground of material change in circumstances is premised on mostly conjectures with no plausible proof in support. Proof regarding the truthfulness of a claim lies with the one who makes the claim, if this burden is not met, then the claim is unfounded, and its opponents need not argue further in order to dismiss it. As the facts of the case had disclosed the consent order was recorded on 7 January 2018 and by consent of the parties herein in the presence of their respective legal counsels, it was mutually agreed that custody care and control of the said children were given to DW and access were given to PH every weekends from Saturday 9am until Sunday 2pm commencing from 13 January 2018, one week during long school holidays, on the said children's birthday and Deepavali on alternate years, daily telephone call for 30 minutes and a place for pick up and drop off, of the said children at the entrance of Police Station SS17 (refer para 5(a)–(e) of the said consent order).

[15] In *YCC @ JCC v LSY* [2006] 7 MLJ 137; [2007] 7 CLJ 207, it is ruled that the applicant husband carries the evidential burden of satisfying the court, on a balance of probabilities, that there is a material change of circumstances. After examining the submissions and materials presented by both parties before the court, it is my considered view that PH in the present case has failed to discharge the burden place upon him and what he has presented and adduced do not constitute material change in circumstances to warrant a variation of the said consent order. I find as follows:

- (a) PH's concern on the education of the children is without substantial basis to form a conclusive finding that living with DW materially affects the education of the said children. It must be observed that the said children (girls) are five and seven years old respectively and requires care, nurture, guidance and planning for their educational awareness and future achievement. There is no evidence adduced to even remotely show or suggest that DW is a detrimental influence on the said children's education. What is before the court is the conjecture and bare suggestion of PH which cannot amount to material change necessitating a variation. It is the considered view of this court that the present education of the children is the responsibility of both parents and is not an elective matter to pick and choose. If the concern of PH is sincere than he should take appropriate steps to ensure the said children are well tutored rather than fighting for a change of custody as a pre-requisite even though no material change in circumstances had occurred in that regard;
- (b) allegation of trauma and stress experienced by the children are likewise merely bare assertion with no evidence adduced to attest to the integrity of such serious allegations. The use of the highly technical words of stress and trauma in the psychological field denote a state of mental health issue and yet again it remains a bare assertion which in this instance I find such terms being freely used with no sustainable corroboration in order

- A to paint a picture of discontent in the said children against the mother. Children of such age are susceptible to suggestions and will act and conduct themselves as such. In short, children will be children until they attain a level of maturity to fully appreciate and express themselves.
- B When you have a child of such infancy expressing an unhappiness over anything it ought to be taken with not a grain but a handful of salt and that certainly will not amount to stress and trauma to constitute a material change in circumstances. At this juncture there was no report to say that the said children were not well taken care off or abused by DW
- C and it is my considered view that it is quite normal for children as young as the said children are too frequently complaint unless there are clear evidence of anything sinister going on and in the present case there in none. The parties must be enlightened enough to appraise a want as opposed to a need of a children of such age. In *Melissa Marie Albert v Malcolm Fernandez and another appeal* [2019] 2 MLJ 290; [2018] 1 LNS 1963; [2019] 1 AMR 229, Court of Appeal held:
- D [34] ... We are of the view that the father can continue to guide the child and bring out the best in the child even if the mother is given custody of the child, and the father is given regular access. In our considered opinion, it is critical for the welfare of the child to have constant daily or regular care by the
- E mother. A child, in particular one who is only five years old, is of tender age and needs the tender nurture and care of his mother in his most formative years.
- F In the present case, PH can play a role and can continue to guide the said children and bring out the best in them even though the mother is given custody of the said children while he is given regular access. This arrangement should not and must not be viewed with contempt or prejudice or as a manner of warring competition between feuding spouses. This is not about them (feuding spouses) but about the said
- G children;
- H (c) the issue raised by PH on the alleged safety of the said children is similarly devoid of merits and should not have been used as a basis of this application. His concern of the unknown person with apparent dermatological disorder fetching the said children is no other than the 64-year-old senior uncle of DW who suffers from cancer where the medical treatment he received had caused the said disorder. It is unfortunate that PH had to use this issue as a ground for this application. It would have mitigated embarrassment to the relevant party had a discreet inquiry been made to clarify the matter rather than blindly
- I forwarding it as one of the grounds for this application which I similarly find to be without merit;
- (d) I also hold the issue of the allegation by PH of the said children having to move several places to stay leading to doubt in their residential security to

be without merit. Between the said allegation of PH and the explanation of DW at para 9(c) of her affidavit (encl 33), I find in her favour. It is her contention that she ran away with the said children from PH due to constant domestic violence inflicted on her which forces her to take refuge with her uncle who is a fellow and scientist with a research centre but she was politely asked to leave because of the constant harassment her uncle received from PH and his friends. However, the said 67-year-old uncle offered to shelter her and the said children by paying rental of RM1,650 a month for a house which has three bedrooms to allow DW and the said children to live comfortably. It is only when this issue of accommodation was settled that DW is now able to take orders for her small catering business. Failure to enclose a tenancy agreement in contesting this application is not a serious issue as it is not in dispute that the said children currently has a home to stay;

- (e) on the issue of the alleged financial predicament faced by DW, I hold that it should not in the circumstances of the case be held against her. DW (a university graduate) had elected to foray into small catering business to sustain herself and the said children. It is a noble effort deserving of encouragement and commendation rather than condemnation or prejudice. The way this issue is being used and pursued by PH is disturbing when he overlooks that such an offensive blade can cut on both sides. Anchored on the materials before me, I find that PH is not being truthful in his averment. In this present application, PH is applying for DW to pay for the said children's maintenance if custody is given to him which obviously runs contrary to his allegation. On the other hand, I agree with DW, for PH who is earning RM14,700 (PH alleged only about RM8,000) a month and yet can only afford RM400 a month for each child which today, by any measure of standard is inadequate. The degree of concern for the said children's welfare must be met with equal compassion and financial commitment; and
- (f) PH had also failed to provide any evidence to support his allegation that DW had failed to comply with the said consent order when DW refused to answer his call during the important date, ie birthday and that DW had refused to allow him to be with the said children during the holidays. No material has been provided with required corroboration to substantiate such allegations.

[16] It is my considered view that the arguments of PH as reflected in para [7] above is a fallacious effort to seek a variation of the said consent order. The link in events does not necessarily imply connection or the expected outcome from such events. The alleged conclusions of the grounds offered by PH in support of his application lies in a conclusion arrived at without considering or looking into other factors potentially responsible for the result known as the 'post hoc fallacy' postulated from the *Latin* term 'Post hoc ergo

A propter hoc' ('after this, therefore because of this'). This type of argument remains largely unpersuasive.

B [17] As for PH's application for custody of the child on the ground that he has time to take care of the said children, I wish to state here that the paramount consideration for determining custody under s 88(2) of the LRA shall be the welfare of the child even though the court shall have regard to the wishes of the parents of the child, and the wishes of the child where he or she is of an age to express an independent opinion. The said children are now currently seven years old and five, there is a rebuttable presumption under s 88(3) of the Act that enhances the natural law that the custody of any child below the age of seven years shall be given to the mother. No materials of evidential value have been presented by PH to rebut this statutory presumption or to justify why changes in custody in the present case is required.

D [18] There is a long line of authorities that holds that the mother should be entitled to custody of a child during what is called the period of nurture, until the child attains seven years (see *Sivajothi a/p K Suppiah v Kunathasan all Chelliah* [2000] 6 MLJ 48; [2000] 3 CLJ 175, *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189; [1981] CLJ 174). I refer to the case of *Viran all Nagapan v Deepa a/p Subramaniam and other appeals* [2016] 1 MLJ 585; [2016] 3 CLJ 505 where the Federal Court held that:

F (4) The paramount consideration in determining the custody of a child is the child's welfare. This is pronounced by s 88(3) of the LRA which also makes clear that the presumption that a young child is better off with his or her mother rather than his or her father is a rebuttable presumption. This presumption too must be weighed together with other relevant factors.

FUNDAMENTAL NON-COMPLICANE

G *Defective intitule on the OS*

H [19] I would like to make a fundamental observation as regards to the application (encl 26) filed by PH. He had elected to use O 42 r 13 of the RC 2012 to move this court to hear his application to vary the said consent order. This is clearly procedurally erroneous when the correct and appropriate legislation to be referred to and used is s s 97 of the LRA that had set down the grounds for variation of a custody or maintenance (consent order in this case) order in a matrimonial proceeding.

I [20] Nowhere in the intitule of the said OS has that section been referred to, to appropriately move this court. This type of error had been ruled by the Court of Appeal as an embarrassing pleading and may be struck out unless sooner amended (see *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin*

Abdul Rahman [1995] 1 MLJ 457; [1995] 4 CLJ 127 (CA)). Unfortunately, this error was never corrected by PH even though he had submitted before the court on s 96 of the LRA. Notwithstanding the fact that this error was never disputed or brought up by the parties during the hearing of this application, this court still holds that such fundamental defect that stood uncorrected would be fatal to PH's case as the law is settled in such matters. It is to be mentioned that on this ground alone PH application could be dismissed.

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Failure to file notice of intention to use affidavits

[21] PH averred at para 5 (encl 25) of his affidavit, that he wishes to use all the same affidavits in support/reply to this OS for this present application as well, without filing any notice of intention to use earlier affidavit as required under O 32 r 13 of the RC 2012. Previously, O 32 r 13 of the RHC 1980 required notice of intention to use affidavits only to be given to the other party, with no requirement of such notice being filed. This has been changed with O 32 r 13 of the RC 2012 and a notice of intention to use affidavits in Form 58 must be filed and served. There remains a discretion in the court to use affidavits despite a failure to give notice of intention to use the affidavit if the opposing party would not be prejudiced: *Re Yeap Chee Fun; Ex P Pernas Trading Sdn Bhd* [2000] 5 MLJ 510; [2000] AMEJ 0246; [2000] 5 CLJ 280 (HC). However, it must not be forgotten that judicial discretion must be exercised judiciously subject to the facts and circumstances of the case before it. In the present case in the absence of reasonable justification to exonerate the intentional non-compliance with the rules, PH is barred from referring to his earlier affidavits.

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CONCLUSION

[22] I find no materials of significance presented by PH to support the alleged detriment impacted on the welfare and the interests of the said children by continuing to stay with DW. Allegations by PH of DW's unsuitability remained merely that, bare allegations with no probative materials and/or basis to anchor it on except conjectures by PH.

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[23] In the circumstances of the case, on balance of probabilities, I find that PH has no justifiable basis to attempt a revisit and seek a variation of the said consent order and consequently I have no hesitation in dismissing this application to vary the said consent order with cost of RM2,000 to be paid forthwith.

I

Application dismissed with costs of RM2,000.

Reported by Addibah Adnan